

Fair Political Practices Commission

Memorandum

To: Chairman Randolph, Commissioners Blair, Downey, Huguenin and Remy

From: William L. Williams, Jr., Chief of Enforcement
Carla Wardlow, Technical Assistance Division Chief

Date: October 10, 2006

Subject: Diversion Program

BACKGROUND

On May 11, 2006, the Commission requested that the Enforcement Division move forward with the concept of a diversion program. Such a program would be similar to diversion programs currently offered by many agencies, such as the Medical Board of California and Traffic Court. The program's goal is to provide a remedial educational alternative to administrative prosecution for minor violations of the Political Reform Act (the Act).¹ The two-fold effect of this program would be to educate participating members of the regulated community regarding their obligations under the Act through referral to a set training program in lieu of administrative prosecution, and to free up Enforcement staff resources to pursue more serious violations.

In this memorandum, the Enforcement Division brings back a number of the issues that the Commission discussed with recommendations as to substantive and procedural implementation of the program, the sub-parameters of the program, and seeks further direction regarding the Commission's preferences as to the scope and procedural implementation of the program.

IMPLEMENTATION OF A DIVERSION PROGRAM

Decision Point 1: Should the Commission adopt a regulation implementing a diversion program?

Authority for a Diversion Program

Under the Act, the Commission has the primary responsibility for the administration and implementation of the Act. (Section 83111.) In the same vein, the Commission also has the authority to adopt regulations carrying out the purposes of the Act and governing its procedures.

¹ The Political Reform Act is contained in Government Code sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in sections 18109 through 18997 of title 2 of the California Code of Regulations. All regulatory references are to title 2, division 6 of the California Code of Regulations, unless otherwise indicated.

(Section 83112.) The Commission is entitled to substantial deference in exercising its authority to implement the Act. (*Californians for Political Reform Foundation v. Fair Political Practices Commission* (1998) 61 Cal.App.4th 472, 484.)

Along with its authority to implement the Act, the Commission has primary authority to administratively enforce the Act and substantial authority to enforce it civilly in court. (Sections 83115 et seq. and 91000 et seq.) Inherent in the Commission's authority to enforce the Act is the prosecutorial discretion to determine what actions it will pursue and how it will pursue them. Courts have recognized that a prosecutor's decision to refer a given case to a diversion program is part of the exercise of prosecutorial discretion: "Thus, a prosecutor's decision to decline to prosecute a particular defendant on condition that he participate in an alternative program—i.e., a diversion decision --has traditionally been viewed as a subset of the prosecutor's broad charging discretion." (*Davis v. Municipal Court* (1988) 46 Cal.3d 64, 77.)

While referral to a diversion program is part of the exercise of prosecutorial discretion, these programs have historically been enacted by statute. (See Vehicle Code section 42005; Business and Professions Code section 2340, et seq.; and Penal Code section 1001, et seq.) The state Medical Board has enacted detailed regulations for its diversion program for physicians, but again the authority for these regulations was expressly provided for by statute. (Cal. Code of Regs., tit. 16, sections 1357-1357.8; Business and Professions Code sections 2340, et seq.) However, no court decisions have addressed the authority of an administrative agency to adopt a diversion program where it is not specifically provided for in enabling legislation.

At its May 11, 2006, meeting, the Commission indicated its preference that a regulation be adopted setting forth the basic outlines of a diversion program. As a policy of "general application," a diversion program would appear to be an exercise of the Commission's rule-making authority under the Act, and adoption of it by regulation may be legally required. (*Morning Star Company v. State Board of Equalization* 38 Cal.4th 324, 333.) Additionally, the regulatory adoption process provides the appropriate forum to best consider the program procedures and substantive parameters of the program as they may further the purposes of the Act.

Violations to be Included under the Diversion Program-Three Options

At the May 11, 2006, meeting, the Commission gave staff direction as to the substantive scope of the Diversion Program. The Commission indicated its preference that there be no set monetary cap for participation in the program. Based on the Commission's direction, Staff developed a percentage [of non-disclosure] based threshold for program inclusion. However, after reviewing cases from 2004 as a sampling to determine the scope of potential Diversion Program participation, there only would have been three cases meeting the five percent threshold for participation. Subtracting out the streamlined eligible cases, only one case would have been eligible for Diversion in 2004.

Moreover, upon reviewing the cases from 2004, it is apparent that the percentage threshold calculation would in itself require more intake investigation. For example, to determine the total amount spent over a calendar year for purposes of determining whether the

percentage threshold was met in failure to file [campaign statement] case, the intake person would have to engage in a much broader review of campaign statements than might otherwise be done in simple non-filing case. Indeed, many of the 2004 case files did not have the data necessary to determine if the percentage threshold had been met because that was not information that would normally have been gathered in the intake process. Additionally, to the extent that the purpose of the percentage threshold is to allow participation in diversion by large campaigns, those large campaigns would normally involve sophisticated treasurers whose errors are not based on a lack knowledge, so their participation would not serve a meaningful educational purpose. Also, to the extent that penalties are paid out of campaign committee funds, there would be little incentive for a busy professional treasurer to give up his/her valuable time for a training program on issues in which he/she is already well-versed.

Therefore, the Enforcement Division is including options primarily based on flat monetary thresholds of \$30,000 and \$50,000 for the Commission's consideration.

OPTION NO. 1

- Sender identification allegations where the candidate or committee can be identified and does not otherwise comply with statute or regulation;
- Complaints against city or county clerks who fail to provide public access to campaign statements or statements of economic interests;
- Recipient committees that fail to report contributions or expenditures when:
 - The amount of unreported contributions is no more than 5% of the total contributions received during the reporting period;
 - The amount of the unreported expenditures is no more than 5% of the total expenditures made during the reporting period;
- Recipient committees that fail to file or file late campaign reports when the amount of the combined unreported late contributions is no more than then 5% of the total amount spent by the committee in that calendar year;
- A recipient committee's failure to report complete donor information under section 84211 where all contributions were subsequently returned to the contributors;
- Recordkeeping violations where:
 - The amount of contributions with missing or incomplete records is no more than 5% of the total contributions received during the reporting period;
 - The amount of the expenditures with missing or incomplete records is no more than 5% of the total expenditures made during the reporting period;

- Subvendor violations where the amount of unreported expenditures is no more than 5% of the total expenditures during the reporting period;
- Independent expenditure committees that fail to report expenditures or that file late reports when the amount of the unreported expenditures is no more than 5% of the total expenditures made during the reporting period;
- Any unreported contribution by a major donor committee when the amount unreported is no more than 5% of the total of contributions made during the reporting period;
- Lobbying disclosure violations of no more than \$15,000 during the reporting period;
- Gift limit violations of no more than \$100 above the statutory gift limit for non-lobbyists;
- Technical disqualification violations involving the manner of disqualification; or
- Slate mailer semi-annual campaign statements where the amount unreported is no more than \$15,000 during the reporting period.

OPTION NO. 2

- Sender identification allegations where the candidate or committee can be identified and does not otherwise comply with statute or regulation;
- Complaints against city or county clerks who fail to provide public access to campaign statements or statements of economic interests;
- Major Donor committees that fail to file semi-annual campaign reports where the total amount of contributions made is no more than \$30,000;
- Recipient committees that fail to file semi-annual campaign reports where the total amount of contributions received is no more than \$30,000;
- Recipient committees that fail to file pre-election campaign reports where the total amount of contributions received is no more than \$30,000;
- Recipient committees that fail to report contributions or expenditures when:
 - The amount of unreported contributions is no more than \$30,000 during the reporting period;
 - The amount of the unreported expenditures is no more than \$30,000 during the reporting period;

- Recipient and major donor committees that fail to file or untimely file late campaign reports when the amount of the combined unreported late contributions is no more than \$30,000 in that calendar year;
- A recipient committee's failure to report complete donor information under section 84211 where all contributions were subsequently returned to the contributors;
- Recordkeeping violations where:
 - The amount of contributions with missing or incomplete records is no more than \$30,000 during the reporting period;
 - The amount of the expenditures with missing or incomplete records is no more than \$30,000 during the reporting period;
- Subvendor violations where the amount of unreported expenditures is no more than \$30,000 during the reporting period;
- Independent expenditure committees that fail to report expenditures or that file late reports when the amount of the unreported expenditures is no more than \$30,000 during the reporting period;
- Any unreported contribution by a major donor committee when the amount unreported is no more than \$30,000 during the reporting period;
- Lobbying disclosure violations of no more than \$30,000 during the reporting period;
- Gift limit violations of no more than \$100 above the statutory gift limit for non-lobbyists;
- Technical disqualification violations involving the manner of disqualification; or
- Slate mailer semi-annual campaign statements where the amount unreported is no more than \$30,000 during the reporting period.

OPTION NO. 3

- Sender identification allegations where the candidate or committee can be identified and does not otherwise comply with statute or regulation;
- Complaints against city or county clerks who fail to provide public access to campaign statements or statements of economic interests;
- Major Donor committees that fail to file semi-annual campaign reports where the total amount of contributions made is no more than \$50,000;

- Recipient committees that fail to file semi-annual campaign reports where the total amount of contributions received is no more than \$50,000;
- Recipient committees that fail to file pre-election campaign reports where the total amount of contributions received is no more than \$50,000;
- Recipient committees that fail to report contributions or expenditures when:
 - The amount of unreported contributions is no more than \$50,000 during the reporting period;
 - The amount of unreported expenditures is no more than \$50,000 during the reporting period;
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- Recipient and major donor committees that fail to file or untimely file late campaign reports when the amount of the combined unreported late contributions is no more than \$50,000 in that calendar year;
- A recipient committee's failure to report complete donor information under section 84211 where all contributions were subsequently returned to the contributors;
- Recordkeeping violations where:
 - The amount of contributions with missing or incomplete records is no more than \$50,000 during the reporting period;
 - The amount of the expenditures with missing or incomplete records is no more than \$50,000 during the reporting period;
- Subvendor violations where the amount of unreported expenditures is no more than \$50,000 during the reporting period;
- Independent expenditure committees that fail to report expenditures or that file late reports when the amount of the unreported expenditures is no more than \$50,000 during the reporting period;
- Any unreported contribution by a major donor committee when the amount unreported is no more than \$50,000 during the reporting period;
- Lobbying disclosure violations of no more than \$50,000 during the reporting period;
- Gift limit violations of no more than \$100 above the statutory gift limit for non-lobbyists;
- Technical disqualification violations involving the manner of disqualification; or

- Slate mailer semi-annual campaign statements where the amount unreported is no more than \$50,000 during the reporting period.

Projected Potential Participation in the Program

As discussed above, under Option 1 using the 2004 case sampling, including streamlined eligible cases, only three cases would have been eligible for diversion. Subtracting out the streamlined eligible cases, one case would have been eligible for the Diversion Program.

Under Option 2, using the 2004 case sampling and the \$30,000 threshold, including streamlined eligible cases, 95 cases were potentially eligible for the Diversion Program. Subtracting out the streamlined eligible cases, 75 cases would have been eligible for the Diversion Program. The majority of these cases would be campaign non-disclosure or campaign non-filing cases.

Under Option 3, using the 2004 case sampling and the \$30,000 threshold, including streamlined eligible cases, 106 cases were potentially eligible for the Diversion Program. Subtracting out the streamlined eligible cases, 82 cases would have been eligible for the Diversion Program. As with Option 2, the majority of these cases would be campaign non-disclosure or campaign non-filing cases.

Discretionary Exclusion of Cases from the Program

Under the Streamlined Programs, the Enforcement Division has the authority to exclude any case from those programs based upon set criteria. In this regard, the Enforcement Division uses some of the criteria in Regulation 18361.5, subdivision (d), as guidelines to evaluate a case for discretionary exclusion from the program:

- Evidence exists that the violator intended to conceal, deceive, or mislead;
- Evidence exists that the violation was deliberate;
- The violator is under current agency investigation or prosecution;
- There are prior prosecutions against the violator;
- The amount unreported would make the streamlined program inappropriate resulting in an injustice;
- The violator declines to participate in the streamlined program; or
- The overall circumstances are such that the streamlined program's application to a case would result in an injustice.

Regulation 18361.5, subdivision (d), also includes whether a violation “was isolated or part of pattern” as a potential aggravating factor. Accordingly, the above criteria for discretionary exclusion should also include whether there is a pattern of non-compliance with the Act. The same discretionary factors should also be used in determining if a case should be excluded from the Diversion Program.

Recommendation:

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The Enforcement Division recommends that the Commission consider for adoption a regulation authorizing a diversion program that includes the violations of the Act and thresholds set forth in Option 2 and the factors for discretionary exclusion set forth above. Staff recommends that cases eligible for the streamlined programs be excluded from the Diversion Program as the streamlined programs have already proven to be very effective as an alternative remedy, while effectively using staff resources, and serves the same educational function as the untested Diversion Program. Also staff would recommend exclusion of any cases that are within two years of the statute of limitations for the violation(s), so as to avoid a potential use of the program as a tactical tool, and to avoid the necessity of obtaining tolling agreements with participants.

The static threshold in Option 2 would be easily implemented, and that threshold allows for substantial potential participation in the program to determine if diversion is viable concept in practice as a remedial alternative. While Option 3 has many of these same qualities, in some campaign contexts the application of a \$50,000 threshold would appear to allow potential participation of large committees that would probably not benefit from diversion, or would eschew it as a remedial alternative.

Staff also recommends that the Diversion Program be limited only to violators that admit their violations. Inherent in the concept of diversion to remedial training is a violator's acknowledgement of wrongdoing and the need for such training.

Decision Point 2: How should the Diversion Program be procedurally implemented?

The Enforcement Division recognizes that the Diversion Program may relieve some divisional workload if it is efficiently handled at the front end of the investigatory process. To that end, staff envisions that referral to Diversion would be made early in the intake process. Diversion referrals would be handled in a manner similar to streamlined cases, where cases that meet the eligibility criteria are identified by intake staff, and a written inquiry is made to a potential respondent that includes the terms for participation in the program and a set time to opt for participation in the program.

If a person decides to participate in the program, intake staff would monitor the participant's completion of the program, closing the case upon receiving certification of completion of the training, or referring the matter for administrative prosecution if the training is not timely completed.

Recommendation:

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At a minimum, the procedural terms for participation in the Diversion Program should include a written document under which: within 30 days the participant affirmatively requests remedial training in lieu of prosecution; agrees to the completion of such remedial training within a set period of time; acknowledges the violation(s) of the Act; agrees to waive his/her administrative hearing rights; and agrees to the entry of an administrative order finding the acknowledged violations of the Act if the training is not completed in one year from the date that the case is referred to diversion.

EFFECT OF PARTICIPATION IN THE DIVERSION PROGRAM

Decision Point 3: What should be the effect of a participant's successful completion of the Diversion Program?

The anticipated benefit of the bargain for a would-be respondent's participation in the Diversion Program is that an enforcement action will not be pursued. Since the Diversion Program would be implemented during the intake process, the case could simply be closed upon timely submission of appropriate certification that the remedial training has been completed. There would be no need for any after-the-fact expungement of an order.

In terms of the Enforcement file, the Public Records Act and Commission's Records Retention Policy constrains any deletion of complaints or other documents from the file. However, the certification of completion of the Diversion Program could be included in it, and any entry in the Enforcement database regarding the case would reflect no prosecution, only completion of the program.

Additional issues relating to successful completion of the program include a waiver of any late filing fees payable to filing officers and the preclusion of private civil suits. Under the streamlined enforcement programs, the Secretary of State waives late filing fees where a party enters a stipulated settlement. Under section 91008.5, preclusion of a private civil suit can only be accomplished by an administrative order of the Commission under section 83116. As such, completion of the program will not result in the preclusion of private civil suits based on the violation(s).

Recommendation:

The Enforcement Division recommends that upon certification of successful completion of the program, the case be closed by letter to the potential respondent. The enforcement file in the case would be closed, but all intake documents and documents related to the participation in the program would be retained. The Enforcement database would show that the case was closed without prosecution because of successful completion of the program. The Enforcement

Division also recommends that a waiver² of late filing fees be sought from filing officers as a result of a participant's successful completion of the Diversion Program.

Decision Point 4: Should a respondent's successful participation in the Diversion Program be considered in future enforcement proceedings under the Act?

Currently, a prior violation of the Act is treated as an aggravating factor when an appropriate penalty for a violation is being evaluated. At the May 11, 2006, meeting, the Commission generally supported the idea that prior participation in the Diversion Program should not be considered as an aggravating factor for any subsequent violation(s) of the Act. However, one of the purposes of the Diversion Program is the education of the participant as to his/her obligations under the Act to ostensibly avoid future violations. To that end, use of successful participation in the program to show that a participant had notice and knowledge of his/her obligations under certain provisions of the Act is fully consistent with the goals and purposes of the program.

Recommendation:

The Enforcement Division recommends that it be allowed to use successful participation in the program to establish a respondent's notice of his/her obligations under the Act in a future enforcement proceeding where a defense of good faith mistake of law is raised. However, it would not be used as a factor in aggravation in support of a more severe penalty.

Decision Point 5: What should be the effect of a participant's failure to timely complete the Diversion Program?

As discussed above, prerequisites for participation in diversion include the participant's written agreement to waive his/her administrative hearing rights and to the entry of an administrative order finding the acknowledged violations of the Act, if the training is not completed in the specified period. This would allow the Enforcement Division to proceed directly to the Commission in lieu of an adversary administrative hearing, and seek an appropriate penalty for the violation(s) where a respondent fails to successfully complete the program. Additionally, nothing would preclude the parties from reaching a stipulated settlement and order in lieu of such summary proceedings.

Where the failure to complete the Diversion Program is not through the fault of the participant, some mechanism allowing for a reasonable extension of time to complete the program could be provided for.

Recommendation:

The Enforcement Division recommends that a participant's failure to complete the program result in a summary proceeding before the Commission, as described above.

² Further research is necessary to determine if a waiver of fees can be given where a filing officer has sent out notice of the filing requirements under Section 91013, subdivisions (a) and (b).

Additionally, the Enforcement Division recommends that there be a mechanism to extend the time to complete the program based upon good cause.

TRAINING OPTIONS UNDER THE DIVERSION PROGRAM

Decision Point 6: What training programs should be available to participants in the Diversion Program?

Currently, the Technical Assistance Division engages in a number of ongoing training programs for the regulated community. As described below, it is anticipated that at least some Diversion Program participants can be directed to such ongoing training programs. However, some of the violations included within scope of the program may require additional scheduling of existing training programs and development of new training programs. Until the substantive parameters of the program are established, it is unclear how many or what types of additional training programs will be needed.

- **Campaign Disclosure.** Currently, the majority of our campaign disclosure workshops focus on reporting requirements for candidate-controlled recipient committees. For other types of recipient committees (e.g., ballot measure and general purpose committees), a new workshop will be needed to accommodate them. We may be able to modify the existing candidate program for this purpose.

We do not currently conduct workshops for major donor committees and non-recipient independent expenditure committees, or for slate mailer organizations.

- **Lobbying Disclosure.** We have conducted lobbying disclosure workshops in the past, but due to lack of attendance and the fact that the lobbying disclosure requirements rarely change, we do not regularly conduct workshops in this area and would need to design a workshop for the Diversion Program.
- **Conflicts of Interest.** Each year, we conduct several workshops on Form 700 disclosure, although these are usually held at the request of a particular agency and are tailored to the disclosure requirements established in that agency's conflict of interest code. We do not have any workshops specifically related to gifts or the gift limits, although the subject of gifts is covered in detail in the disclosure workshops.

We occasionally conduct or participate in workshops conducted by the Legal Division related to overall disqualification requirements, but do not have a general overview workshop that can be used for the Diversion Program. We have nothing specifically related to the issue of "manner of disqualification."

Currently, however, all state and local officials are required to take an ethics course every two years. These courses review the gift limits and other rules relating to conflicts of

interest.

- **Filing Officer Duties.** At least 10 workshops are conducted each year for filing officers, both for campaign reports and for statements of economic interests (Form 700). We also schedule individual meetings each year as part of the agency's filing officer outreach program. No additional resources would be needed for filing officer diversion training.

It takes approximately 90 hours to design and present a new workshop (eighty hours for design and review, plus 10 hours for trainer and materials preparation and conducting the workshop). Redesigning an existing workshop (e.g., modifying the candidate workshop to accommodate other types of campaign filers) will take approximately 40 hours, plus 10 hours for preparation and conducting the workshop. To conduct a workshop using an existing program takes from 6 to 12 hours depending on the age of the program and whether it needs to be updated to reflect changes in the law.

Recommendation:

According to the 2004 case sampling, it appears that only campaign violations by committees (recipient, major donor, and independent expenditure committees) would have been eligible for diversion training, and perhaps only three committees would have qualified. (There was one filing officer case for which existing programs are available, as discussed above.)

At most, a workshop covering reporting rules for all recipient committees may be useful. Because major donor and independent expenditure committees are not subject to the same level of reporting (i.e., they only report expenditures made) and many are eligible for the streamlined programs, we do not recommend creation of a workshop for them. Candidates could be offered either the general diversion training for recipient committees or one of our regular candidate workshops, if one is available.

For violations related to gifts or conflicts of interest, the Commission may want to consider requiring respondents to take (or re-take) the ethics course discussed above in a given period of time in lieu of creating another workshop. For lobbying disclosure, as noted above, none of the 2004 cases in the sampling qualified for diversion training. We recommend that the Commission not create a diversion training program for lobbying.

FUNDING FOR THE DIVERSION PROGRAM

Decision Point 7: Will additional funding be necessary to implement the Diversion Program?

The Enforcement Division anticipates that implementation of the Diversion Program will result in additional workload for the Political Reform Consultants, who must still perform a normal intake assessment of the complaint and preliminary evidence. Under the program, additional staff time beyond the normal intake assessment will be necessary to determine eligibility for the program in terms of the violations and thresholds, possible discretionary exclusion from the program, provide notification to respondents of program eligibility and terms,

acknowledge and calendar affirmative requests to participate in the program, and follow up to ensure that the participants timely complete the program.

Using the 2004 case sampling, if the Commission accepts the Enforcement Division's recommendation of Option 2, less streamlined eligible cases, 75 cases would be eligible for the program. Assuming that 30% of the cases fall out of the program based upon the respondent's rejection of the program or discretionary exclusion, 52 cases would be eligible for diversion. It is estimated that the additional duties attendant to a diversion referral would add approximately three hours per case to the normal enforcement intake process for Political Reform Consultants, and another half hour for attorney review of each case. This would mean that there would be an estimated 156 additional hours of non-attorney staff time and 26 hours of attorney staff time associated with ongoing operation of the program over a year. There would also be considerable additional staff time associated with the start-up of the program in developing and implementing forms, calendaring and monitoring procedures, necessary staff protocols in terms of case review, and staff training. It is estimated that such start-up time would require approximately 250 non-attorney hours and 200 attorney hours.

For the Technical Assistance Division, if one new training program is designed for the Diversion Program, approximately 75 hours in non-attorney staff time will be required for designing the program and producing the materials. Assuming that the training program would be presented twice a year, once in Northern California and once in Southern California, an additional 24 hours (not including travel time) of non-attorney staff time will be required, as well as attendant travel expenses associated with out-of-town training.

Recommendation:

While some of these costs may or may not be offset by the potential reduction in full investigations and prosecutions, depending upon how many respondents choose to participate in and complete the program, the Enforcement Division recommends that for the first year of the program, the Commission should budget for at least an additional 406 hours of non-attorney staff time and 226 hours of attorney staff time in start-up and operation of the program for the Enforcement Division. While it would depend on the number of new training programs necessary, the Technical Assistance Division will require at least an additional 100 hours in non-attorney staff time for start-up and operation of the program in the first year. Thereafter, it is recommended that experience with the actual operation of the program be used to set budgetary requirements for it.